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SUPREME COURT OF THE UNITED STATES

IN THE OCTOBER TERM, 1955

PETITION FOR CERTIORARI

No. 569

E. H. RissER, ET AL. ..... *Petitioners*

v.

City of Little Rock, Arkansas, ET AL. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Bernal Shamster
Pyramid Life Building
Little Rock, Arkansas
Counsel for Petitioners

PARHAM PRINTING CO., LITTLE ROCK

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SUPREME COURT OF THE UNITED STATES

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E. H. RISSER, ET AL. ..... *Petitioners*

v.

CITY OF LITTLE ROCK, ARKANSAS, ET AL. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

E. H. Risser and G. B. Oliver, Jr., the petitioners herein, pray that a writ of certiorari be issued to review the final decree of the Supreme Court of the State of Arkansas affirming the decree of the Chancery Court of Pulaski County, Arkansas, denying to petitioners the due process of law guaranteed by the Constitution of the United States and permitting respondents to damage and take the property of petitioners without compensation or without providing any means by which compensation may be recovered.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Chancellor (T. 66-92) is unreported and is printed in Appendix B hereto, *infra*, page 29. The opinion of the Supreme Court of Arkansas (T. 331-339), printed in Appendix B hereto, *infra*, page 29, is reported in The Law Reporter, Vol. 99, p. 733, July 4, 1955, and 281 S. W. 2d 949.

JURISDICTION

The judgment of the Supreme Court of Arkansas, the highest court of the State, was rendered on July 4, 1955, one judge dissenting (T. 330); Appendix B hereto, page 29 *infra*. Petition for rehearing was duly filed within the time prescribed by law and was denied on October 3, 1955 (T. 345). The judgment of which review is sought is a final judgment of the Supreme Court of Arkansas. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution. * * *."

THE QUESTION PRESENTED

Is the constitutional guaranty of due process of law infringed by the act of a city taking, closing, and obstructing a dedicated street and right of way providing the only reasonable means of access of petitioners from their homes and property to the community, county, and state highway system generally and incorporating them within its airport, all of which is judicially determined to damage petitioners'

property, without paying or making provision to pay for the damages to petitioners' property?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Fourteen to the Constitution of the United States provides, in part:

> "• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law: • • •."

STATUTORY PROVISIONS INVOLVED

The Arkansas statutory provisions involved are Sec. 19-2304, Arkansas Statutes, 1947. The statute is printed in Appendix A, *infra*, page 20.

HOW FEDERAL QUESTION IS PRESENTED

Petitioners raised the question of due process in the complaint filed by them in the lower court (T. 6-7) as follows:

> "Defendants have damaged the plaintiff and others similarly situated by substantially diminishing the value of the land that they own. The defendants have not paid the plaintiff or others similarly situated for the damage done to them from the operation of the airport as above described, and from their attempt to close the streets as above described; until and unless the defendant pay the plaintiff and all others similarly situated for said damage, said ordinance is void as an unlawful taking of property without just compensation therefor, all as forbidden under the provisions of the Constitution of 1874 of the State of Arkansas, and the Constitution of the United States of America."

and in the appellate court in both their brief on appeal and their reply brief. The lower court necessarily passed upon

the federal question involved in its memorandum opinion in saying (T. 84):

> "The third legal issue raised in this case is the question of whether the plaintiff's, the intervener's, or any other similarly situated property owner's property has been taken or damaged within the meaning of the Arkansas Constitutional provision. Arkansas Constitution of 1874; (Art. 2) Sec. 22."

Art. 2, Sec. 22 of the Constitution of Arkansas reads as follows:

> "Property rights—Taking without just compensation prohibited.—The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

The Arkansas Supreme Court overruled the lower court's ruling that property owners must abut on the closed portion of a street to be damaged but said because there were many in the same position as the petitioners and since the city might in the future enlarge the property owners' right of way to its originally dedicated size, the property owners could not recover damages. There was one dissent to the opinion of the Arkansas Court, two judges not participating. The court necessarily passed upon the federal question in its opinion stating (T. 337):

> "The principal contention of the appellants in regard to East 26th Street is that their property is especially suitable for industrial development and that the change in the street materially lessens the value of the property from that standpoint. They say that 26th Street, before being relocated, had a 160-foot right of way. (The paved section was formerly 18 feet wide, while the new pavement is 22 feet wide.) Appellants contend that the 160-foot right of way would be more attractive to industries than the new 40-foot right of way. The city owns all of the property on both sides

of the old right of way as well as that on both sides of the new right of way."

"No doubt the city is anxious to assist in the industrial development of the county and it is not unreasonable to believe that the city would cooperate to the fullest extent in providing the necessary facilities for industries. But, be that as it may, the fact remains that appellants have access to the city and that they have suffered no peculiar and special damages. Appellants own a few hundred acres of land, but the streets in question lead to an area consisting of thousands of acres of level, alluvial soil that is the same as that owned by appellants."

Petitioners further raised the question in the petition for rehearing (T. 341-342, 343) in which they state:

"3. The opinion of the court errs in finding that the damages suffered by the property owners east of the bottle-necked roads, appellants herein, are the same as the damages suffered by the general public. The landowners of the Fourche Dam Pike area are not the 'general public'. The inconvenience of the general public is of a different nature and kind from the damage to the value of appellant's property caused by the city's acts. These landowners are forced to come to the city to reach markets, schools, churches, and the general systems of roads and highways. The general public may or may not go to the Fourche Dam area, as it pleases. The record is uncontroverted that appellants' property has suffered a material depreciation in value. The court's assumption that the city will cooperate in providing the necessary rights of way for industrial facilities is outside the record and wholly contradictory to the proof that the city has not done so and through one of the commissioners states it will not do so." • • •

"7. The opinion of the court errs and deprives the property owners of any relief for the special damages they have suffered. The depreciation of the value

of their property because of the city's taking of these streets is a damage and taking in violation of the due process provided for in the Constitution of the United States. The court erred in its holding that this question did not merit consideration."

The Supreme Court of Arkansas necessarily passed upon the federal question involved in denying said petition for rehearing. Its decision is squarely in conflict with the decisions of this Court construing the due process provisions of the Fourteenth Amendment to the Constitution of the United States. There is a direct conflict between this decision of the Arkansas Court and the decisions of this Court on a federal question.

STATEMENT OF MATTER INVOLVED

The case involves the right of property owners, citizens of the United States, to due process of law under the Fourteenth Amendment of the Constitution of the United States for the damaging of petitioners' property.

The respondents are the City of Little Rock and the commissioners of the Little Rock Municipal Airport Commission.

Plaintiff and intervener, the petitioners herein, are citizens, property owners, and residents of Pulaski County Arkansas, and brought an action, in their behalf and in behalf of all others similarly situated, to enjoin the defendant city and the defendant commissioners of the Little Rock Airport Commission, their agents, servants and employees from closing, blocking, obstructing, or barricading any portion or portions of two certain streets providing the only reasonable means of access from the homes and property of petitioners to the City of Little Rock and to the County and State highway system generally.

The only practical means of traveling between the property and homes of petitioners and all others living in the area lying east of the Little Rock Municipal Airport, such area being known as the Fourche Dam Pike area, has been to travel over one of two roads lying in Pulaski County, Arkansas, and in the City of Little Rock, and extending along the northern and the southern boundaries of the Municipal Airport. Except for the use of said two streets, East 10th Street and East 26th Street, also known as East Roosevelt Road, the property of the petitioners is in a *cul de sac* in so far as access to the City of Little Rock and to the County and highway system generally. The Arkansas River is north and east of the Fourche Dam area and the Arkansas River levee along Fourche Creek is on the immediate south side of the area.

In the year 1934 the City of Little Rock desired to expand its airport on the east side of said city and proposed to close East 17th Street and the county road known as Fourche Dam Pike, both of which were then outside the city limits and under the jurisdiction of the county. The city filed its petition therefor in the Pulaski County Court (T. 281-284). The property owners in the Fourche Dam Pike area, including the owners of property now owned by petitioners, filed their responses to said petition of the City of Little Rock alleging their damages on account of East 17th Street being closed, that such street was the only practical access route of the property owners, that no funds or provisions for compensation were available to pay for the damages which would be suffered by said property owners in the event of such closing, and that to diminish the value of their property without provision for just compensation would deprive them of their property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States, and in violation of the provisions of the Constitution of the State of Arkansas

(T. 257-268). After hearing, the county court denied said petition of the City of Little Rock (T. 284). This order became the law of the case and from it no appeal was ever taken.

Thereafter a written agreement was made between the mayor of the City of Little Rock, the county judge of Pulaski County, both being duly authorized, and a committee representing the property owners of the Fourche Dam Pike area whereby it was agreed that said property owners would not oppose the closing of East 17th Street and would not ask damages from the city or county for any such closing providing the city and county would construct, pave and maintain certain alternate routes along the south and north boundaries of the airport to the homes and property of the petitioners and other property owners (T. 275-277).

In 1940 the City of Little Rock requested a modification of the 1935 agreement under which the City of Little Rock would agree to extend, improve, dedicate and maintain to a width of 60 feet East 10th Street to the city limits and build a road extending east and then south to Fourche Dam Pike and to extend, improve, and maintain East 26th Street with a right of way of 160 feet along the south side of the airport to Fourche Dam Bridge. After deliberation and further negotiations the property owners agreed in writing with said city and county, defining the new streets, their method of construction and the extent of the rights of way, waived their right to any compensation for the damages suffered by their property, and contributed rights of way and funds for the purchase of rights of way for the extension and construction of said streets (T. 120-121).

In 1952, in violation of the above described agreements, the respondents undertook to close East 10th Street and East 26th Street, and an action was brought by petitioners to prevent said closing, such action being *G. B. Oliver, et al.*

v. *City of Little Rock, et al.*, No. 97549, in the First Division, Pulaski Chancery Court (T. 311-315). On June 26, 1953, the Chancellor, on hearing decreed that the city was without power to close said streets (T. 321-323). Said decision is determinative of the issues in the present case, was never appealed from or set aside, and is *res adjudicata* of the issues herein. The authority for respondents' claiming said streets is claimed by them under Ordinance No. 9290, Appendix A hereto, *infra*, page 20.

The dedicated streets in question, with their specified rights of way are necessary to the petitioners and others similarly situated. The respondents are closing said streets to include them and their rights of way in the Little Rock Municipal Airport. The closing of said streets and the taking of said rights of way by the respondents impair and reduce the value of the property of the petitioners. Neither of the respondents have adequate means to compensate for the damages caused by their acts; they have made no provision for the payment of such compensation; the rights of the petitioners to compensation under the circumstances are settled and *res adjudicata*; and, respondents are taking and damaging property of petitioners, and others similarly situated without due process of law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Arkansas has necessarily decided an important question arising under the Fourteenth Amendment to the Constitution of the United States, involving the rights of citizen property owners to due process of law for the wrongful taking and damaging of their property rights. The decision of the Supreme Court of Arkansas concedes and establishes the fact of damage but does nothing about it. It is untenable and in conflict with the applicable decisions of this court. The Arkansas Court has denied and renounced its power to protect the petitioners

in their claims of rights, privileges and immunities secured by the Constitution of the United States.

1. The taking of private property for public use without compensation denies petitioners' constitutional rights.

> "• • • a judgment of a state court, even if it is authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such a judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument." *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 266, 241, 41 L. Ed. 979.

Compensation for private property taken for public use constitutes an essential element in due process of law and without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, violates the provisions of the Federal Constitution.

Searl v. *School District No. 2,* 133 U. S. 533, 33 L. Ed. 740;
Sweet v. *Rechel,* 159 U. S. 380, 40 L. Ed. 188;
Appleby v. *Buffalo,* 221 U. S. 524, 55 L. Ed. 838;
West v. *Chesapeake P. Teleph. Co.,* 295 U. S. 662, 671, 79 L. Ed. 1640, 1646.

The right of access to property is a property right. The taking of such a right is the taking of property to the damage of the owner and requires the payment or securing of payment of compensation for such damages. *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787. The taking cannot be exercised without compensation to take away rights which come under the protection of the Fourteenth Amendment to the Constitution.

Muhlker v. *New York & H. R. Co.*, 197 U. S. 544, 49 L. Ed. 872;

Wheeler v. *New York, N. H. & H. R. Co.*, 178 U. S. 321, 44 L. Ed. 1085;

Union Electric Light & Power Co. v. *Snyder Estate*, 65 F. 2d 297;

Schiefelbein v. *United States*, 124 F. 2d 945.

In order for a property owner's constitutional rights to be destroyed it is not necessary that an actual physical invasion of his real estate occur. His damage is not limited to the physical injury to his land. Where there has been a physical disturbance of a right which the owner enjoys in connection with his property and which gives it additional value, compensation is required.

Chicago v. *Taylor*, 125 U. S. 161, 31 L. Ed. 638;

Portland Ry. etc. Co. v. *Portland*, 181 F. 632;

Omaha Horse Ry. Co. v. *Cable Tramway Co.*, 32 F. 727, appeal dism. 140 U. S. 692;

Nichols on Eminent Domain, 3rd Ed., Vol. 2, Sec. 6.441 (3).

The Airport Commission has no power of eminent domain. The authority of the city to close streets is limited to those streets not needed for corporate purposes or whose use is impracticable or impossible. Arkansas Statutes, 1947, 19-2304 (2), Appendix A, hereto, *infra*, page 20. The city's exercise of authority here has no relation to these powers. It closed the street to incorporate the physical body of the street into its airport. There is no evidence in the record to the contrary. The city appropriated the rights of way of the streets for its airport use. The mere statement of the city council in its ordinance that a public purpose was involved does not make it conclusive that such

a purpose was in fact the reason for the act. *Cincinnati* v. *Vester,* 281 U. S. 439, 74 L. Ed. 950.

Actually, the taking and damaging in this instance is similar to that of taking the private property of one person, without the owner's consent, for the private use of another. This has been consistently condemned.

Wilkerson v. *Leland,* 27 U. S. 2 Pet. 627, 658, 7 L. Ed. 542;

Davidson v. *New Orleans,* 96 U. S. 97, 102, 24 L. Ed. 616;

Missouri P. R. Co. v. *Nebraska,* 164 U. S. 403, 41 L. Ed. 489.

In arbitrarily ignoring the rights of petitioners under the Fourteenth Amendment the lower court has determined that a city may deprive property owners of their property rights by taking a dedicated right of way for street purposes and using it for its municipal airport without compensation to the admittedly injured owners. The court below has deprived petitioners of their substantive rights upon grounds without fair or substantial support.

The action of state courts in depriving parties of substantive rights by enforcing a substantive common-law rule formulated by such courts may result in the denial of rights guaranteed by the Fourteenth Amendment.

Shelley v. *Kraemer,* 334 U. S. 1, 17, 92 L. Ed. 1161; *Bridges* v. *California,* 314 U. S. 252, 86 L. Ed. 192.

2. The question of whether a right protected by the Federal Constitution was denied or ignored by the state court is one upon which this court forms an independent judgment. It will not adopt a state decision in conflict with its settled decisions. The existence of the right is part of the federal question itself.

Ward v. *Love County*, 253 U. S. 17, 64 L. Ed. 751, 758, states the applicable rule thus:

> "Whether the right was denied, or not given due recognition, by the Supreme Court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."

Also:

Hoadley v. *San Francisco*, 124 U. S. 639, 31 L. Ed. 533;

Boyd v. *Nebraska*, 143 U. S. 135, 36 L. Ed. 103;

Citizens Saving Bank v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840;

Merchants National Bank v. *Richmond*, 256 U. S. 635, 65 L. Ed. 1135.

It was necessary to the determination of this cause that the lower court determine whether petitioners' property was taken or damaged in violation of the Constitution of the United States. The decree below could not be given without deciding this point. In its opinion the Arkansas Supreme Court recognized that petitioners' property was damaged but denied petitioners' right of recovery because:

1. The city may at some future time restore to or provide for the petitioners an access right of way equal to that taken from them so that their property will not be damaged; and
2. There are many property owners in the Fourche Dam area, affected by the city's taking, in addition to the petitioners.

Merely stating the court's grounds for denying the petitioners' rights for compensation demonstrates that

their rights guaranteed by the Fourteenth Amendment have been denied them. For these reasons the court says the damages of petitioners are not special or peculiar. Such refusal to protect petitioners' rights, for the reasons given in the opinion, is not the measure of justice provided by the due process of law.

The lower court completely overlooked the fact that the original complaint filed and the intervention stated a class action for the benefit of all the property owners in the Fourche Dam area (T. 2, 27). The fact that many are damaged instead of only one does not reduce, diminish, or destroy the rights guaranteed petitioners under the Constitution of the United States. The court's use of the terms "special and peculiar" under these circumstances is an evasion of the constitutional question.

The existence of a state constitutional right does not prevent the assertion of the Federal question. The Fourteenth Amendment furnishes an additional guaranty against any encroachment by the states in violation of due process.

United States v. *Cruikshank,* 92 U. S. 542, 23 L. Ed. 588;

In Re Kemmler, 136 U. S. 436, 34 L. Ed. 519;

Orr v. Gilman, 183 U. S. 278, 46 L. Ed. 196.

This case is not similar to that of *Marchant* v. *Pennsylvania R. Co.,* 153 U. S. 380, 38 L. Ed. 751, and others, where the lower court found that the acts did not "under the laws and constitution of that state, constitute a taking, an injury, or a destruction of the plaintiff's property". The damage is not the mere inconvenience of using the limited substitute route. The damage is the admitted destruction of the value of the property for industrial use. This damage is suffered specially and alone by the petitioners and others

similarly situated. Here the court conceded that there were damages to the value of petitioners' property but denied petitioners their rights to compensation. No question of fact is involved. The decision absolutely disregards the constitutional rights of petitioners to be paid for what is taken. *Roberts* v. *New York*, 295 U. S. 264, 277, 79 L. Ed. 1429, 1435.

3. The question at issue is a substantial one. As a class suit for all of the property owners in the Fourche Dam area it involves several hundred pieces of property and in excess of a million dollars in damages. This evidence is uncontradicted in the record (T. 154). Moreover, there is in question here the basic right of a citizen to the protection of the law in the face of a taking of his property that sacrifices constitutional principles in order to acquire land without expense and to incorporate it into a municipal airport. The very land which is taken to deprive petitioners of their right of access is appropriated for the city's airport. In lieu thereof is substituted a permissive use, not a dedicated right of way equal to that taken, but a use by sufferance of a lesser right of way, a longer and more inconvenient route. The substitution materially damages the petitioners.

In the present growth of government by commissions and administrative boards the rights of citizens are consistently eroded because appointed administrative boards are not responsive to the electorate. Also, such boards and commissions have limited objectives in one certain field of public interest rather than the broad and over-all welfare of the citizens. For these reasons the citizens and property owners must rely more and more upon the courts for the protection of their rights and privileges. If the courts arbitrarily disregard such rights the citizen is left with no protection. Certainly, when the state court finds that property owners are damaged, and then refrains from giving

them relief because (1) the city may at some indefinite future time provide adequate access rights of way, and (2) because there are many property owners involved, their due process of law is denied. A municipal corporation cannot under the guise of performing a governmental function, take or damage private property for public purposes without just and adequate compensation being first paid.

The substantial damage to the property owners of the Fourche Dam neighborhood occasioned by any vacation or closing of their only means of access has been consistently recognized by the state courts heretofore. Beginning in 1934 with the order and judgment of the Pulaski County Court denying the city's right to close off these owners from the city, county and state generally, and continuing through the many written agreements between the city and the property owners, evidencing the right to compensation for injuries which would be suffered by the owners by leaving them in a *cul de sac* without access, and the decree of the Pulaski Chancery Court in 1953, it has been uniformly and continuously recognized that substantial damages would be received by reason of the city's cutting off these properties from the rest of the community. The question of the existence of damages is *res adjudicata*. The consideration given by the property owners, in the form of relinquishment of claims for damage and the furnishing of rights of way without cost, has been uniformly recognized. The unique position of the properties of petitioners requires access through the area which the city is blocking by its airport expansion. The Fourche Dam area is bounded on the north and east by the Arkansas River and on the immediate south by the Arkansas River levee along Fourche Creek (T. 140-141, Map, Exhibit 16, T. 307). These natural barriers force the owners in the area to proceed west in order to prevent their isolation. It is to the west that the city, markets, schools, churches, and the county and state

highway system lie. The usurpation of the only available access of these property owners by incorporating all of the streets running west between the Arkansas River and the Arkansas River levee along Fourche Creek into an airport causes those owners grievous and severe damage.

4. No provision is made for the compensation of the petitioners because of the damage to their property. The payment of compensation for private property taken for public use is an essential element of due process of law. The question of actual payment prior to the time of taking is not at issue. What is at issue is the right to receive compensation. Here, the city and the airport commission have not only failed to tender compensation or to provide any method of recovering compensation, but they have also put themselves into the financial position where they cannot pay compensation.

The obligation to pay just compensation for private property taken for public use is a condition upon which the power of eminent domain may be exercised. *Cincinnati* v. *Louisville & N. R. R. Co.*, 223 U. S. 390, 56 L. Ed. 481. Payment of the compensation due for such taking must be insured and the full faith and credit of the political division involved must be pledged to the payment. Where a property owner permits a political subdivision to damage his property he is limited to such relief as it may provide. If the property owner does not protect his right through the injunctive process he has only an unliquidated demand to be satisfied at the pleasure of the political subdivision. The petitioning property owners, here, are not willing to surrender their damages for an useless judgment against the city or the airport commission. The right to compensation, where the property owner asserts his damage and right to compensation before the taking is not limited to possible award made therefor at the pleasure of the state. The property owner is entitled to the security of payment

of his compensation within a reasonable time and in a reasonable manner.

Sweet v. *Rechel*, 159 U. S. 380, 40 L. Ed. 188;

Liberty Cent. Trust Co. v. *Greenbrier College for Women*, 50 F. 2d 424, aff'd. 283 U. S. 800, 75 L. Ed. 1422.

It is uncontradicted in the evidence and explicitly found and determined by the state Supreme Court that the act of the city in taking the 160 feet of right of way along 26th Street depreciates the value of the property of petitioners and others in the Fourche Dam area. The present value of the area for industry is most substantial. The court's opinion admits the loss of value for industrial uses. According to the undisputed testimony the damage occasioned by the city's acts causes the property owners loss in excess of a million dollars.

Olson v. *United States*, 292 U. S. 246, 255, 78 L. Ed. 1236, 1244, discusses the "equivalent" value which must be paid as compensation for the damaging of private property for public use. The opinion states:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as to the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206, 208; *Clark's Ferry Bridge Co.* v. *Public Service Comm.*, 291 U. S.

227, Ante, 767, 54 S. Ct. 427; 2 Lewis, Em. Dom., 3rd Ed., Sec. 707, p. 1233; 1 Nichols, Em. Dom., 2d Ed., Sec. 220, p. 671."

The petitioners' right to compensation as a right guaranteed under the due process provisions of the Fourteenth Amendment is that of receiving the equivalent of the market value of the property at the time of the taking contemporaneously paid in money.

Olson v. *United States*, 292 U. S. 246, 78 L. Ed. 1236;
Seaboard Air Line R. Co. v. *United States*, 261 U. S. 299, 306, 67 L. Ed. 664, 669;
Jacobs v. *United States*, 290 U. S. 13, 17, 78 L. Ed. 142;
United States v. *Klamath and Modoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219.

One of the most certain tests of the character and value of government is the fullness and sufficiency of the security which surrounds the individual in the use and enjoyment of his property. In the instant case the court below has said to the petitioners that their compensation may eventually be given them by the city in returning to them an equivalent access right of way and that there are too many property owners damaged to allow compensation. Such answers do not provide the due process guaranteed to petitioners.

CONCLUSION

Your petitioners respectfully submit that the writ of certiorari should issue to the end that this Court may review the decision of the Supreme Court of Arkansas and determine whether that court has deprived petitioners of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

BERNAL SEAMSTER
Little Rock, Arkansas
Counsel for Petitioners

APPENDIX A

Constitution of Arkansas, 1874, Article 2, Sec. 22:

> "Property rights—Taking without just compensation prohibited.—The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

Arkansas Statutes, Annotated 1947, Sec. 19-2304:

> "Additional powers of cities of first class.—In order to better provide for the public welfare, safety, comfort and convenience of the inhabitants of cities of the first class, the following enlarged and additional powers are hereby conferred upon said cities of the first class, viz.: * * *
>
> "Second. To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or lease out such portions thereof as may not for the time being be required for corporate purposes, and where lands have been or may be acquired or donated to such city, for any object or purpose which has become impossible or impracticable, the same may be used or devoted for other proper public or corporate purposes, or sold by order of the city council and the proceeds applied therefor." * * *

CITY OF LITTLE ROCK, ARKANSAS

ORDINANCE NO. 9290

AN ORDINANCE VACATING AND TRANSFERRING TO OTHER PUBLIC PURPOSES THAT PORTION OF EAST TENTH STREET FROM THE EAST LINE OF RIVER STREET EASTWARD BETWEEN BLOCK 57 ON THE NORTH AND BLOCK 59 ON THE SOUTH, BOTH IN INDUSTRIAL PARK ADDITION, ANNEX NO. 1 TO THE CITY OF LITTLE ROCK, ARKANSAS,

AND VACATING AND TRANSFERRING TO OTHER PUBLIC PURPOSES THAT PORTION OF THE EAST TENTH STREET CONNECTION TO THE FOURCHE DAM PIKE FROM THE EASTERN LINE OF INDUSTRIAL PARK ADDITION, ANNEX NO. 1 TO THE CITY OF LITTLE ROCK, ARKANSAS, TO THE N/S PORTION OF SAID CONNECTION TO FOURCHE DAM PIKE MORE PARTICULARLY DESCRIBED AS FOLLOWS: THAT PORTION OF THE EXTENSION OF EAST TENTH STREET EASTWARD FROM THE EAST LINE OF INDUSTRIAL PARK ADDITION ANNEX NO. 1, TO THE CITY OF LITTLE ROCK, ARKANSAS, EASTWARD ON A BEARING OF SOUTH 89° 57' EAST A DISTANCE OF 893 FEET TO THE POINT OF BEGINNING OF A 10° CURVE TO THE RIGHT AND CONTINUING ALONG THE CURVE A DISTANCE OF 703 FEET MEASURED ALONG THE CENTER LINE OF SAID EAST TENTH STREET EXTENSION TO A POINT WHERE THE EXISTING RIGHT-OF-WAY INTERSECTS THE WEST LINE OF A RIGHT OF WAY AS DEDICATED BY THE TEXAS-EASTERN TRANSMISSION CORPORATION AND AS RECORDED IN THE OFFICE OF THE RECORDER OF PULASKI COUNTY, ARKANSAS, IN DEED BOOK NO. 510, PAGE 257, ON MARCH 27, 1953, THE RIGHT-OF-WAY OF SAID STREET BEING 60 FEET WIDE, 30 FEET THEREOF LYING ON EACH SIDE OF SAID CENTER LINE AS DESCRIBED: AND VACATING AND TRANSFERRING TO OTHER PUBLIC PURPOSES THAT PORTION OF EAST ROOSEVELT ROAD FROM THE WEST RIGHT-OF-WAY LINE OF THE MISSOURI PACIFIC RAILROAD COMPANY EASTWARD TO A POINT WHERE A NEW ROAD, AS CONSTRUCTED BY THE BUREAU OF AIR NATIONAL GUARD ON OR ABOUT JUNE 15, 1953, CONNECTS WITH SAID EAST ROOSEVELT ROAD,

MORE PARTICULARLY DESCRIBED AS FOLLOWS: THAT PORTION OF EAST ROOSEVELT ROAD, HAVING A RIGHT-OF-WAY 160 FEET WIDE, 53 FEET THEREOF LYING NORTH OF THE CENTER LINE OF PAVEMENT AND 107 FEET THEREOF LYING SOUTH OF SAID CENTER LINE, FROM A POINT IN THE CENTER OF EXISTING PAVEMENT, WHICH POINT IS 407 FEET SOUTH AND 1,716.86 FEET EAST OF THE NORTHWEST CORNER OF THE NE¼ OF SECTION 13, TOWNSHIP 1 NORTH, RANGE 12 WEST, PULASKI COUNTY, ARKANSAS, AND WHICH POINT IS THE WEST RIGHT-OF-WAY LINE OF THE MISSOURI PACIFIC RAILROAD COMPANY AND RUNNING EASTWARD A DISTANCE OF 1,875 FEET—SAVE AND EXCEPT THE EXISTING RIGHT-OF-WAY OF A PUBLIC ROAD KNOWN AS THE FRAZIER PIKE WHERE THE SAME INTERSECTS SAID DESCRIBED PORTION OF EAST ROOSEVELT ROAD: TRANSFERRING SAID VACATED PORTIONS OF SAID STREETS TO OTHER PUBLIC (MUNICIPAL AIRPORT) PURPOSES: AND FOR OTHER PURPOSES.

WHEREAS, The Bureau of Air National Guard and the Little Rock Municipal Airport Commission have heretofore constructed an extension of the NE/SW runway at the Little Rock Municipal Airport of sufficient length to accommodate jet and other large types of aircrafts and for the installation of an instrument landing system in connection therewith; and

WHEREAS, portions of East Tenth Street and East Tenth Street extension in the City of Little Rock, Arkansas, interest the safety approach zone of said runway on the Southwest; and

WHEREAS, the use of said runway by jet and other large aircraft constitute a great hazard to the lives and property of persons using said portions of said streets and the use of said streets by motor vehicles and other traffic further constitutes a great hazard to the safety of air-borne traffic using said runway for landings and take-offs, thereby making the continued use of said streets impossible and impracticable; and

WHEREAS, said use of said streets prevents the installation of an instrument landing system by the Civil Aeronautics Administration of said airport, which system is essential to the proper development and use of said airport; and

WHEREAS, other suitable, safe, adequate and convenient paved streets have heretofore been constructed with air signal safety lights for use by the public in traveling to and from the areas now served by said portions of East Tenth Street, East Tenth Street extension and East Roosevelt Road, and said portions of said East Tenth Street, East Tenth Street extension and East Roosevelt Road, having become dangerous and impracticable for public use as city streets, are no longer required for corporate purposes and

WHEREAS, in order to better provide for the public welfare, safety, comfort and convenience of the users of said streets, of the inhabitants of the City of Little Rock, Arkansas, and of the airport traffic using said Little Rock Municipal Airport, it is necessary, to alter, vacate, abandon and close the following portions of said East Tenth Street, East Tenth Street extension and East Roosevelt Road in the City of Little Rock, Pulaski County, Arkansas, to-wit:

That portion of East Tenth Street from the East line of River Street eastward between Block 57 on the North

and Block 59 on the South, both in Industrial Park Addition, Annex No. 1, to the City of Little Rock, Arkansas, That portion of the East Tenth Street connection to the Fourche Dam Pike from the Eastern line of Industrial Park Addition, Annex No. 1, to the City of Little Rock, Arkansas, to the N/S portion of said connection to Fourche Dam Pike, more particularly described as follows: that portion of the extension of East Tenth Street eastward from the East line of Industrial Park Addition, Annex No. 1 to the City of Little Rock, Arkansas, eastward on a bearing of South 89° 57′ East a distance of 893 feet to the point of beginning of a 10° curve to the right and continuing along the curve a distance of 703 feet measured along the center line of said East Tenth Street extension to a point where the existing right-of-way intersects the West line of a right-of-way as dedicated by the Texas-Eastern Transmission Corporation and as recorded in the office of the Recorder of Pulaski County, Arkansas, in Deed Book No. 510, page 257, on March 27, 1953, the right-of-way of said street being 60 feet wide, 30 feet thereof lying on the east side of the said center line as described; and that portion of East Roosevelt Road from the West right-of-way line of the Missouri Pacific Railroad Company eastward to a point where a road as constructed by the Bureau of Air National Guard on or about June 15, 1953, connects with said East Roosevelt Road more particularly described as follows: that portion of East Roosevelt Road, having a right-of-way 160 feet wide, 53 feet thereof lying North of the center line of pavement and 107 feet thereof lying South of said center line, from a point in the center of existing pavement, which point is 407 feet South and 1,716.86 feet East of the Northwest corner of the NE¼ of Section 13, Township 1 North, Range 12 West, Pulaski County, Arkansas, and which point is the West right-of-way line of the Missouri Pacific Railroad Company, and running eastward a distance of 1,875 feet — save and except the existing right-of-way of a pub-

lic road known as the Frazier Pike where the same intersects said described portion of East Roosevelt Road.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLE ROCK, ARKANSAS:

Section 1. That it is hereby ascertained and declared that the use, as public streets, of those portions of East Tenth Street, East Tenth Street extension and East Roosevelt Road, hereinbefore and hereinafter described, is detrimental to the safety and welfare of the members of the public using the same and of the persons and property using the Little Rock Municipal Airport; that other paved streets and new routes have been specifically constructed to reasonably, safely and adequately serve the needs of the members of the public traveling to and from the areas now served by said portions of East Tenth Street, East Tenth Street extension and East Roosevelt Road; that said portions of East Tenth Street, East Tenth Street extension and East Roosevelt Road are no longer required for corporate purposes as public streets and should be vacated as such, and the said vacated portions of said streets should be transferred to other public use under the jurisdiction of the Little Rock Municipal Airport Commission.

Section 2. That the City of Little Rock, Arkansas, hereby vacates and assigns for other public purposes the following described streets and relinquishes all its rights and the rights of its inhabitants and of the public generally therein to the use thereof as streets to-wit:

That portion of the East Tenth Street from the East line of River Street eastward between Block 57 on the North and Block 59 on the South both in Industrial Park Addition, Annex No. 1 to the City of Little Rock, Arkansas; that portion of the East Tenth Street connection to the Fourche Dam Pike from the Eastern line of Industrial Park Addition Annex No. 1 to the City of Little Rock, Arkansas,

to the N/S portion of said connection to Fourche Dam Pike, more particularly described as follows:

That portion of the extension of East Tenth Street eastward from the East line of Industrial Park Addition, Annex No. 1, to the City of Little Rock, Arkansas, eastward on a bearing of South 89° 57′ East a distance of 893 feet to the point of beginning of a 10° curve to the right and continuing along the curve a distance of 703 feet measured along the center line of said East Tenth Street extension to a point where the existing right-of-way intersects the West line of a right-of-way as dedicated by the Texas-Eastern Transmission Corporation and as recorded in the office of the Recorder of Pulaski County, Arkansas, in Deed Book 510, page 257, on March 27, 1953, the right-of-way of said street being 60 feet wide, 30 feet thereof lying on each side of said center line as described; and that portion of East Roosevelt Road from the West right-of-way line of the New Missouri Pacific Railroad Company eastward to a point where a new road, as constructed by the Bureau of Air National Guard on or about June 15, 1953, connects with said East Roosevelt Road, more particularly described as follows: That portion of East Roosevelt Road, having a right-of-way 160 feet wide, 53 feet thereof lying North of the center line of pavement and 107 feet thereof lying South of said center line, from a point in the center of existing pavement, which point is 407 feet South and 1,716.86 feet East of the Northwest corner of the NE¼ of Section 13, Township 1 North, Range 12 West, Pulaski County, Arkansas, and which point is the West right-of-way line of the Missouri Pacific Railroad Company and running eastward a distance of 1,875 feet — save and except the existing right-of-way of a public road known as the Frazier Pike where the same intersects said described portion of East Roosevelt Road.

Section 3. That a copy of this ordinance, duly certified by the City Clerk, shall be filed in the office of the Recorder of Pulaski County, Arkansas, and recorded in the Deed Records of said County.

Section 4. That all ordinances or parts of ordinance in conflict herewith are hereby repealed.

Section 5. That the following are hereby found to be the facts which constitute an emergency: (a) that the City of Little Rock, Arkansas, owns all of the property adjoining the streets that are hereby vacated; (b) that the Arkansas National Guard Squadron, with operating privileges, is legally stationed at the Little Rock Municipal Airport; that it has been assigned jet aircraft as part of the National Defense Program; and that said jet aircraft require a specially constructed, long runway with instrument landing facilities which can only be completed after the hereinbefore mentioned sections of East Tenth Street, East Tenth Street extension and East Roosevelt Road are vacated; (c) that the commercial airlines now operating from the Little Rock Municipal Airport have recently inaugurated the use of larger airplanes that require the use of a very long runway and an instrument landing system for necessary flight safety during bad weather and the furnishing of essential service to the traveling public; (d) that the construction of the NE/SW runway at the Little Rock Municipal Airport has been completed for said purposes with the exception of the instrument landing system and said runway is now in use by jet and other large types of aircraft in landing and taking off; (e) that the normal flight zone of said aircraft is within five feet vertically of the surfaces of those portions of East Tenth Street and East Tenth Street extension and within ten feet vertically of the surface of that portion of East Roosevelt Road described in Section 2 hereof, in the City of Little Rock, Arkansas, which constitute a great hazard both to the users

of said streets and the users of said runway. Therefore, in order to preserve the public peace, health and welfare, an emergency is hereby declared to exist and this ordinance shall be in full force and effect from and after its passage and approval.

Passed: August 10, 1953.

Approved:

PRATT REMMEL
Mayor

Attest:

H. C. GRAHAM
City Clerk

APPENDIX B

CHANCERY COURT
PULASKI COUNTY, ARKANSAS

E. H. RISSER ..... *Plaintiff*

v. No. 98223

THE CITY OF LITTLE ROCK, JACK EAST, SR., FLOYD SHARP, J. V. SATTERFIELD, JR., P. A. DULIN AND CHRIS FINKBEINER, COMMISSIONERS OF LITTLE ROCK MUNICIPAL AIRPORT COMMISSION ..... *Defendants*

G. B. OLIVER ..... *Intervener*

Decree

On the 15th day of November, 1954, this cause was submitted to the Court. The plaintiff and all other property owners similarly situated appeared by their attorney, John R. Thompson. The intervener appeared by his attorney, Cooper Jacoway. The defendants appeared by attorneys, O. D. Longstreth, Jr., City Attorney, Dave Witt, Assistant City Attorney, and Mehaffy, Smith & Williams, by John T. Williams, and Calvin R. Ledbetter, Jr. After a consideration of all the pleadings filed in this case, the stipulations, the exhibits, the testimony of witnesses, and briefs filed by the parties, the Court finds that the plaintiff, the intervener, and all other property owners similarly situated are not entitled to the relief which they seek nor to any relief whatsoever and that the Complaint of the plaintiff and all other property owners similarly situated and the Intervention of the intervener should be dismissed. A written opinion filed herein on the 2nd day of December, 1954, sets forth the facts and law of this case as found and determined by the Court.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the Complaint of the plaintiff and all other property owners similarly situated and the intervention of the intervener be and are hereby dismissed.

IT IS FURTHER ORDERED AND DECREED by the Court that the defendants in this action be and are hereby given full freedom by this Court to vacate, alter, or change any portion of East Tenth Street and East Roosevelt Road described in Ordinance 9290 of the City of Little Rock, Arkansas.

IT IS FURTHER ORDERED AND DECREED by the Court that the plaintiff and intervener pay all the costs of this action, for which execution or garnishment may issue as upon a judgment at law.

Entered this 6 day of December, 1954.

/s/ GUY E. WILLIAMS
Guy E. Williams
Chancellor

Approved as to form:

/s/ JOHN R. THOMPSON
John R. Thompson
Attorney for Plaintiff

Approved as to form:

_____

Cooper Jacoway
Attorney for Intervener

CHANCERY COURT
PULASKI COUNTY, ARKANSAS

E. H. RISSER ..... *Plaintiff*

v. No. 98223

THE CITY OF LITTLE ROCK, JACK EAST, SR., FLOYD SHARP, J. V. SATTERFIELD, JR., P. A. DULIN AND CHRIS FINKBEINER, COMMISSIONERS OF LITTLE ROCK MUNICIPAL AIRPORT COMMISSION ..... *Defendants*

G. B. OLIVER ..... *Intervener*

Opinion

On August 10, 1953, municipal Ordinance No. 9290 was duly enacted and passed by the City Council of the City of Little Rock, Arkansas. In brief, this ordinance recites that the northeast-southwest runway at the Little Rock Municipal Airport has been extended so that jets of the Arkansas Air National Guard and other large aircraft can safely and conveniently use this runway; that certain portions of East Tenth Street and East Roosevelt Road intersect the approach zone of the northeast-southwest runway; that the use of the portions of these streets which intersect the approach zones of the runway by automotive traffic is hazardous and dangerous to both air and road traffic; that the continued use of the dangerous portions of these two streets prevents the installation of an instrument landing system by the Civil Aeronautics Administration and the installation of such system is essential to the safety and proper development of the Airport; that the continued use of the dangerous portions of these streets is impossible and impracticable; that the dangerous portions of these two streets are no longer required for corporate purposes and that the public safety requires that they be vacated and

closed; that adequate, safe, and convenient substitute routes have been constructed to serve the area formerly served by these vacated portions of East Tenth Street and Roosevelt Road; and that any other ordinance or portion thereof in conflict with this ordinance is repealed.

On August 17, 1953, Mr. E. H. Risser, the plaintiff in this case, filed a Complaint against the City of Little Rock and the Commissioners of the Little Rock Municipal Airport Commission. The plaintiff, in this case, owns property located east of the Airport boundary and east of the city limits of the City of Little Rock, and brought this suit on his own behalf and in behalf of all other property owners who are similarly situated. The plaintiff alleges in his Complaint, which is summarized here; that Ordinance No. 9290 is void as being beyond the power of the City to enact; that both streets are county roads and part of the state highway system; that both streets have been continuously used for a period of more than eight years prior to the enactment of the ordinance; that *res judicata* is applicable to this case; and that the defendants have taken the property of the plaintiff without just compensation therefor. Plaintiff asks that the defendants be enjoined from barricading or tearing up any portion of East Tenth Street or East Roosevelt Road.

The defendants, the City of Little Rock and the Commissioners of the Little Rock Municipal Airport Commission (hereinafter referred to only as "defendants"), filed their Demurrer and Answer on December 8, 1953. The defendants demurred to the plaintiff's Complaint on the grounds that the plaintiff did not have the legal capacity to use and was not a proper party plaintiff. This Demurrer was overruled by the Court. The Answer contained a general denial and further alleged that the northeast-southwest runway of the Little Rock Municipal Airport had been extended to safely accommodate jets of the Arkansas Air

National Guard and other large aircraft; that portions of East Tenth Street and East Roosevelt Road intersect the safety approach zone to the northeast-southwest runway creating a hazardous condition for both air and road traffic and making further use of the exposed portions of both streets impossible and impracticable; that the present use of the streets prevents the installation of an Instrument Landing System by the Civil Aeronautics Administration, and the installation of this system is essential to the continued safe use of the Airport; that prior to the enactment of Ordinance No. 9290, the City of Little Rock owned all of the property adjoining the streets affected by the ordinance; and that safe, adequate, and convenient substitute routes have been provided to serve the same areas formerly served by the vacated portions of East Tenth Street and East Roosevelt Road.

On February 1, 1954, G. B. Oliver (hereinafter referred to as the "intervener"), a property owner also owning property located east of the boundaries of the Little Rock Municipal Airport, filed his Intervention in this case and adopted the allegations of the plaintiff's Complaint. Defendants filed a Demurrer and Answer to the Intervention. The defendants demurred on the grounds that the intervener did not have the legal capacity to sue and was not a proper party to the action. This Demurrer was overruled by the Court. The Answer to the Intervention filed by the defendants contained a general denial and the same additional allegations as are found in the defendants' Answer to the plaintiff's Complaint. The intervention of G. B. Oliver was allowed by this Court on February 1, 1954.

Upon motion of the defendants, the Court issued an Order dated March 24, 1954, temporarily closing the portion of East Roosevelt Road allegedly vacated by Ordinance 9290 because the Court found that portion of East Roosevelt Road to be deteriorated to such an extent that safe

passage was impossible. The Order was issued pending final determination of the case and was issued without prejudice to the rights of either party.

Another Intervention in the case was filed on April 1, 1954, by the Little Rock Chamber of Commerce in which it sought to be made a party defendant in this cause due to its interest in the Airport both in its individual capacity and as a representative of the public generally. The Petition for Intervention was granted by the Court on April 22, 1954, but was withdrawn on petition of the Intervener on June 29, 1954, after the plaintiff and intervener (G. B. Oliver) had filed notice of appeal to the Supreme Court on the ground that it was error for this Court to overrule their motion to dismiss the Intervention of the Little Rock Chamber of Commerce.

On the 16th day of September, 1954, the intervener (G. B. Oliver) filed an Amendment to his Intervention in which his primary allegations are as follows: that the City of Little Rock in seeking to vacate certain portions of East Tenth Street and East Roosevelt Road is violating an agreement allegedly made by the City with a group of landowners living east of the Little Rock Municipal Airport; that since the defendants have extended the northeast-southwest runway, they are responsible for the danger created and are estopped to allege that the continual use of the dangerous portions of East Tenth Street and East Roosevelt Road is impracticable or hazardous; and that East Roosevelt Road has been designated by the Pulaski County Planning Board as a link in a proposed defense highway as shown on a master plan which has not been changed and is still in effect.

The defendants filed a Demurrer and Answer to the intervener's Amendment on September 29, 1954. The defendants demurred to the Amendment to Intervention on

the grounds that the intervener did not have the legal capacity to sue and was not a proper party to the action and further, that the Amendment did not state facts sufficient to constitute a cause of action. The Demurrer of the defendants was overruled by this Court. In their Answer the defendants, in effect, entered a general denial. The Court allowed the Amendment to the Intervention.

Testimony was heard by the Court on September 16, 1954, and November 15, 1954, and since the parties agreed to a rather lengthy stipulation of facts, the only real disputed factual issue concerning which testimony was taken was the question of the adequacy, suitability, and convenience of the two substitute routes which were constructed to replace the portions of East Tenth Street and East Roosevelt Road allegedly vacated by Municipal Ordinance 9290. These substitute or by-pass routes are marked in blue on Exhibit No. 1.

Witnesses for both parties are apparently agreed that the by-pass routes are safe for the operation of motor vehicles but they disagree markedly as to the adequacy, suitability, and convenience of the two by-pass routes as compared with the old routes which are purportedly vacated by Municipal Ordinance 9290. An expert witness for the defendants testified without contradiction that, on the north, it was necessary to travel an additional 726 feet if the new substitute route were used rather than the old route while, on the south, it was necessary to travel an additional 603 feet if the new by-pass route were used rather than the old route. This same witness testified, again without contradiction, that it would take approximately 30 seconds longer to travel the substitute route on the north. Testimony by expert witnesses also established the fact that the width of both substitute routes was greater than the width of the old routes. Further testimony by expert witnesses established that the substitute or by-pass

route on the north was of better construction than the old route on the north and that the substitute route on the south made the railroad crossing less steep and less dangerous than it had been on the old route on the south. The old route on the south was in such poor condition that this Court was obliged to issue a temporary order closing the older route on the south due to its advanced stage of deterioration and consequent danger.

There are two right angle turns on the substitute route on the north which naturally make this route not as convenient as the older route which is straight. However, the Court has personally viewed and traveled both routes on the north and has traveled the substitute route on the south as well as viewing both the old and the substitute route on the south. It is impossible to travel the old route on the south due to the danger caused by its deterioration. The Court has found both substitute routes to be safe, adequate, and suitable. It is true that the right angle turns on the northern substitute route are less convenient than the older route which was straight, but the Court is informed that these right angle turns were a construction necessity brought about by the levee, the extension of the northeast-southwest runway, and the lack of sufficient right of way for a longer radius turn. This Court is satisfied that the construction was the best available under the circumstances. Certain testimony was also presented to the effect that these substitute routes would fail to encourage the growth of industry east of the Airport but the Court fails to see any merit in this approach because of the highly speculative assumption which would have to be made that large-scale modern industry intends to locate east of the Airport and the Court sees no evidence of this at present. In addition, the substitute routes are much wider than the older routes which the plaintiff and intervener seek restored and thus, the older routes if restored would be less

suitable for industrial purposes in this respect than the new substitute routes.

Thus, even considering two right angle turns, which are not at all uncommon in city streets, an added distance of only 6 to 700 feet, and an added traveling time of only about 30 seconds, this Court fails to see how these factors can amount to more than trifling inconvenience at the best. Trifling inconveniences are part and parcel of the price of municipal progress and such minor irritations are not substantial enough for the Court to say that the new substitute routes are not adequate and reasonable. This Court is therefore satisfied by a preponderance of the evidence that the two substitute or by-pass routes constructed to replace the portion of East Tenth Street allegedly vacated by Municipal Ordinance 9290 (vacated portion shown in red on Exhibit No. 1) and the portion of East Roosevelt Road allegedly vacated by Municipal Ordinance 9290 (also shown in red on Exhibit No. 1) are adequate, safe, and suitable. This Court accordingly finds as a fact that the two substitute routes are adequate, safe, and suitable and that the plaintiff and the intervener and all other property owners similarly situated still have reasonable and adequate access to the general system of city streets.

The following important facts were stipulated by the parties to this suit: the plaintiff and intervener own property located east of the city limits of Little Rock, Arkansas; prior to the construction of the two by-pass routes, the only practical method of travel to the city from this area was over the northern route (designated as East Tenth Street) or over the southern route (designated as East Roosevelt Road); Municipal Ordinance 9290 was duly enacted on August 10, 1953; the portions of East Tenth Street and East Roosevelt Road purportedly vacated by Municipal Ordinance 9290 have been continuously used for a period of eight years prior to the enactment of the Ordinance and

have been used for a period of more than three years prior to the enactment of the Ordinance by more than ten citizens as a means of travel to and from the Pulaski County Courthouse; the map introduced as Exhibit No. 1 shows the old routes, the by-pass routes, the travel distance on both routes, and the city limits as of the date of the passage of Municipal Ordinance 9290; all lands abutting on the allegedly vacated portions of East Tenth Street and East Roosevelt Road are owned in fee simple by the City of Little Rock; and that no portion of the allegedly vacated portions of East Tenth Street and East Roosevelt Road has ever been dedicated to the public for use as a street with the exception of one segment, 158.7 feet in length, located on East Tenth Street and shown on Exhibit No. 1 as the area between two heavy red lines marked A and B.

From the pleadings and the testimony, the following legal questions present themselves for solution: (1) the applicability of *res judicata* to the present case; (2) the validity of Municipal Ordinance 9290; (3) the taking or damaging of the plaintiff's or intervener's property; (4) the violation of the agreement alleged in the intervener's amendment; and, (5) estoppel as a bar to any action taken by the defendants.

This Court will proceed first to a discussion of *res judicata*. On September 22, 1952, the City of Little Rock passed City Ordinance 9004 which attempted to vacate and abandon the portions of East Tenth Street and East Roosevelt Road involved in the present suit as well as certain portions of other streets. The Ordinance was passed by the City Council pursuant to the provisions of Ark. Stats. (1947) 19-3825, which is as follows:

> "19-3825. Authority to vacate—Conditions.—In all cases where the owner of property within a city or town shall have dedicated, or may hereafter dedicate, a portion of such property to the public use as streets

or alleys by platting such property and causing such plat to be filed for record, as provided by law, and any street or alley, or section thereof, shown on the plat so filed shall not have been actually used by the public as a street or alley for a period of five (5) years, the City or Town Council shall have power to vacate and abandon the street or alley, or any portion thereof, by proceeding in the manner hereinafter set forth. (Acts 1945, No. 17, Sec. 2, p. 30; 1947, No. 88, Sec. 1, p. 194.)"

A petition to vacate was filed as provided in 19-3826 and Ordinance 9004 contained recitals to the effect that the portions of the streets sought to be vacated had not actually been used by the public for a period of five years prior to the filing of the petition to vacate. Suit was filed challenging the action taken by the City. The case was styled *G. B. Oliver* v. *The City of Little Rock, E. H. Risser, Intervener,* and bore the clerk's filing number 97549. On or about June 26, 1953, the Chancellor issued his decree enjoining the City from vacating said portions of East Tenth Street and East Roosevelt Road. The decree applied only to East Tenth Street and East Roosevelt Road and meant only that the City had no power under 19-3825 to vacate the streets in question because the factual situation at that time did not meet the requirements of 19-3825 inasmuch as those portions sought to be vacated had been continuously used for the last five years.

The present Ordinance was enacted pursuant to 19-2304 rather than 19-3825 and Section 4 of Ordinance 9290 expressly provides that all Ordinances or parts of Ordinances in conflict herewith are hereby repealed. The City is exerting its power to vacate under an entirely different grant of legislative authority than was provided by 19-3825. The factual situation required before the case can be brought within the purview of 19-2304 is also entirely different from the factual situation required by 19-3825. Two different statutes are involved in the two cases and the factual situa-

tion necessary for the operation of 19-3825 is not the factual situation necessary for the operation of 19-2304. *Res Judicata* is therefore not applicable.

The second legal question to be discussed is the validity of Municipal Ordinance 9290. The validity of this ordinance is under attack on three fronts as set out by the pleadings and briefs: (1) that the streets cannot be closed under the provisions of Ark. Stats. (1947) 19-2304 but only by an exercise of the power of eminent domain; (2) that part of East Tenth Street has been platted and dedicated to the City of Little Rock for use as a street, and consequently, that portion can only be altered or vacated pursuant to Ark. Stats. (1947) 19-3825; and (3) that both East Tenth Street and East Roosevelt Road are under the jurisdiction of the county rather than the city and that East Roosevelt Road, in particular, was designated in its unaltered form by the Pulaski County Planning Board in 1941 as a link in a proposed defense highway.

Municipal Ordinance 9290 was enacted pursuant to the provisions of Ark. Stats. (1947) 19-2304; the pertinent portions of which are as follows:

> "Ark. Stats. (1947) — 19-2304 — In order to better provide for the public welfare, safety, comfort and convenience of the inhabitants of cities of the first class, the following enlarged and additional powers are hereby conferred upon said cities of the first class, viz.:
>
> . . . . .
>
> "Second. To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or lease out such portion thereof as may not for the time being be required for corporate purposes, and where lands have been or may be acquired or donated to such city for any object or purposes which has become impossible or impracticable, the same may be used or devoted for other proper public or corporate purposes, or sold by

order of the city council and the proceeds applied therefor."

In several Arkansas decisions, the power of the City to vacate, alter, or close streets has been unequivocally upheld. *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S. W. 2d 1004; *Barbee* v. *Carpenter,* case No. 5-394, 98 Law Reporter 119. This Court has found no case which indicates either that the Legislature had no power to grant such authority nor that this statute means anything less than it says.

It is true that there are certain Arkansas cases (*Packet Co.* v. *Sorrels,* 50 Ark. 466; *Osceola* v. *Haynie,* 147 Ark. 290) which, at first glance, seem to say that when land has once been dedicated by its owner to the public for use as a street, (in the present case, with the exception of one small segment of East Tenth Street, none of the vacated land has ever been dedicated to the public for use as a street) this land cannot be diverted to purposes foreign to its dedication except under the power of eminent domain. However, the reason for the rule announced in the above cases is to protect the property interests of the abutting landowners on both sides of a dedicated street. They are deemed to possess the fee to the dedicated street subject to the public easement. Therefore, since they own the property in the street, it would be unfair for the City to divert this street to uses which are not consistent with the dedication. In most cases, this would depreciate the value of their property to such an extent that a taking would occur and hence the eminent domain requirement of the *Packet* case. In our present case, abutting property owners need not be protected by the "eminent domain" procedure because the only abutting property owner on both sides of both vacated portions of the two streets is the City of Little Rock. In fact, the fee to the portions of the two vacated streets is in the City of Little Rock as the only abutting property owner.

Taylor v. *Armstrong,* 24 Ark. 102; *Hoxie* v. *Gibson,* 150 Ark. 432; *Lincoln* v. *McGehee Hotel Co., Inc.,* 181 Ark. 1117.

In addition, if the City is not allowed to alter, vacate, or abandon a dedicated street, then all the applicable Arkansas statutes (Ark. Stats. (1947) 19-2304, 19-2313, and 19-3801) are nullities and a municipality, for all practical purposes, lacks the power to control and supervise its streets despite the express intent of the Legislature to the contrary. As is stated in 16 Am. Jur. 373:

> "Thus it has been held that a city cannot accept a dedication of a street subject to conditions that it shall not extend, widen, or in part, close it, since that would be an attempted relinquishment of the power to regulate and control its streets."

The second line of attack on the validity of Municipal Ordinance 9290 concerns the small portion of East Tenth Street which is the only segment of the vacated portions of both streets that has been platted and dedicated to the City of Little Rock for use as a street. It is alleged that this dedicated portion of East Tenth Street can only be altered or vacated pursuant to the provisions of Ark. Stats. (1947) 19-3825 (the five-year non-user statute set out earlier in the opinion). In this regard, the case of *Cernauskas* v. *Fletcher,* 211 Ark. 678, 201 S. W. 2d 999, is highly informative.

The *Cernauskas* case involved an alley in the City of Little Rock which had been closed by the passage of a municipal ordinance. The municipal ordinance had been enacted pursuant to the provisions of Ark. Stats. (1947) 19-2304 and suit was filed alleging that 19-3825 was the statute under which the alley should have been closed. The decision in the case held that 19-3825 had no application unless the property involved had been platted and dedicated to the public use as a street or alley. If the property

involved has not been dedicated to the public use as a street, 19-2304 is the applicable statute. The alley in question had not been either platted or dedicated, and consequently, 19-3825 had no application to the case.

Even though a segment of East Tenth Street, 158.7 feet in length, has been both dedicated and platted, in the opinion of this Court, the *Cernauskas* case does not say that 19-3825 is the exclusive statutory procedure which must be followed in such a case. The *Cernauskas* case clearly states that 19-3825 and 19-2304 are not in conflict and that the enactment of 19-3825 does not repeal 19-2304. As is stated in the *Cernauskas* case, on page 680:

> "The repealing clause reads: 'All laws and parts of laws, and particularly Act 311 of the Acts of 1941, are hereby repealed.' Section 8. No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words, 'in conflict herewith,' which we will imply by necessary construction. When so construed this act does not repeal Sec. 9944 of Pope's Digest, subsection Third, which provides: 'To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or leave out such portions thereof as may not for the time being be required for corporate purposes . . . .'"

Both statutes are therefore operating harmoniously together. The Court feels that the legislative intent in the enactment of 19-3825 was to provide a method whereby adjoining property owners could petition (as provided in 19-3826) the City Council on their own behalf to have dedicated and platted streets vacated or abandoned. On the other hand, 19-2304 is a method provided by the Legislature whereby the City Council on its own initiative can vacate or abandon both dedicated and platted and undedicated and unplatted streets. In support of this reasoning, the

following paragraph found in 64 C.J.S., Municipal Corporations, Sec. 1670, p. 42, may be cited:

> "The procedure to vacate a street or other public way must be in strict compliance with the statutory provisions relating thereto. While a statute which provides a complete system for vacating streets will be construed as repealing a prior act, provisions of different statutes which are not inconsistent may be read together to provide a harmonious scheme. However, a statute giving a method of vacating a street in cases in which the municipal corporation is not in active operation, but which is also applicable to cases wherein the municipal corporation is in active operation, is cumulative to a statutory method applicable only in cases where the municipal corporation is in active *operation, and alternative methods may be provided under separate statutes.*" (Emphasis supplied.)

The case cited in C. J. S. to support the last phrase (the last nine words) is the case of *Cernauskas* v. *Fletcher.*

Any other construction of these two statutes other than that previously discussed would divest the municipalities of the power to supervise and control their own streets and, as has been pointed out previously, such a construction runs contrary to the legislative intent that municipalities should supervise and control their own streets. This Court, therefore, is of the opinion that both dedicated and undedicated property may be altered, vacated, or abandoned under the provisions of 19-2304.

The third line of attack on the validity of Municipal Ordinance 9290 involves allegations that both East Tenth Street and East Roosevelt Road are county roads or public roads and thus removed from municipal jurisdiction. In addition to the enactment of Ark. Stats. (1947) 19-2304, the Legislature has clearly shown its intent to transfer complete control over all streets located within the city limits

to the various municipalities by the enactment of Ark. Stats. (1947) 19-2313 and Ark. Stats. (1947) 19-3801. It is also well settled in Arkansas that when a county road or public road is brought within the city limits, the authority and control of the county cease and the city assumes complete jurisdiction of the road. *Hughes* v. *Arkansas and Oklahoma Railroad Company,* 74 Ark. 194; *Pulaski Gas & Light Co.* v. *Remmell,* 97 Ark. 318. As is stated in the case of *Fitzgerald* v. *Saxton,* 58 Ark. 494, 502:

> "It is the law, now settled and recognized everywhere, that, as a city is extended so as to take in territory, the jurisdiction and control of the county over the highways in such territory is determined, and the city immediately becomes possessed of the same. Thus, when the land in controversy became a part of the City of Little Rock, the public road then leading over and through the same fell under the jurisdiction and control of the City, and the City became at once responsible for the condition of this road as a public highway."

It is also alleged that East Roosevelt Road has been constituted a link in a proposed, but as yet unbuilt, defense highway for Little Rock as shown on a highway plan drawn up by the Pulaski County Planning Board in 1941. On this plan, East Roosevelt Road is shown as originally constructed without the presence of the by-pass route. As shown by Ark. Stats. (1947) 17-1101 through 17-1106, the purpose of the County Planning Board (which has jurisdiction of *unincorporated* county territory only) is to recommend and coordinate and no sanction can be found in the statutes for any jurisdiction over or interference with the complete control which a city exercises over streets within its municipal limits. At any rate, it is self-evident that the defense effort is better served by changing the route of a street which interferes with the safe operation of jet aircraft than by rigid adherence to a plan, proposed

fourteen years ago, for a defense highway which is as yet unbuilt.

After a discussion of these attacks on Municipal Ordinance 9290, this Court holds that Municipal Ordinance 9290 is valid.

The third legal issue raised in this case is the question of whether the plaintiff's, the intervener's, or any other similarly situated property owner's property has been taken or damaged within the meaning of the Arkansas constitutional provision. Arkansas Constitution of 1876, Sec. 22. The Arkansas cases on this subject strongly sustain the rule that a non-abutting property owner has not been damaged by the vacating or altering of a street so long as he is still provided with reasonable access to the general system of streets. *Hot Springs R. R. Co.* v. *Williamson,* 45 Ark. 429; *Little Rock and Hot Springs Western Railroad Company* v. *Newman,* 73 Ark. 1; *Wellbourn* v. *Davies,* 40 Ark. 83; *Stoutemeyer* v. *Sharp,* 89 Ark. 175; *Greer* v. *City of Texarkana,* 201 Ark. 1041. Since the plaintiff and the intervener and all other property owners similarly situated are non-abutting property owners and since this Court has already found that the plaintiff and the intervener and all other property owners similarly situated are still provided with reasonable access to the general system of streets, this Court holds as a matter of law that the plaintiff, the intervener, and all other property owners similarly situated have not suffered any damages.

Although this Court has already found that the substitute routes are adequate, safe, and suitable and that they provide reasonable access to the general system of city streets, it still might be well to point out that in all of the following cases the inconvenience suffered is greater than that suffered by any travelers of the substitute routes in this case, and yet, in all these cases below, the inconven-

ience suffered was not great enough to reach the stage of "actual damage", reasonable access to the general system of streets was still provided, and all recovery was denied. *R. Zasa* v. *Public Service Commission,* 102 Pa. Super. Ct. 317, 156 A. 714 (substitute route was a half-mile longer); *Bryan* v. *Petty,* 162 Iowa 62, 143 N. W. 719, 145 Pac. 835 (necessary to travel two miles farther to get to town); *Davis Colliery Co.* v. *Harding,* 83 W. Va. 609, 98 S. E. 815 (substituted road had a much steeper grade).

The fourth legal question raised in the case concerns the alleged violation by the City of certain agreements purportedly made between the Mayor of Little Rock and certain landowners living in the Fourche Dam Area. The first agreement (Exhibit No. 12) is a document dated February 16, 1935, and signed by the Mayor of the City of Little Rock, the Pulaski County Judge, and four property owners living east of the Airport. In essence, this agreement recites that with the closing of that portion of Fourche Dam Pike which crosses the Airport, the City will build a road extending Fourche Dam Pike south from its former location to a junction with Frazier Pike. The agreement contains no language stating that the property owners have agreed to waive their damages so long as the City continues to abide by the agreement nor does it contain language to the effect that the City has agreed to maintain and keep open this road indefinitely. The construction of the road was carried out as provided for in the agreement.

The agreement referred to above (Exhibit No. 12) is the only written agreement found in the case and the road referred to in the written agreement was maintained in its original location for a period of six years. With the advent of World War II, it was again necessary to expand the limits of the Municipal Airport and the intervener alleges an oral modification of the original agreement (Exhibit No. 12). According to the intervener, the original agree-

ment remained intact except that in return for the closing down of the road, the construction of which was provided for in the original agreement, the City would extend and maintain East Tenth Street to the city limits at the northeast corner of the Airport and would extend and maintain East Roosevelt Road from its intersection with Highway 65 east along the south side of the Airport to Fourche Dam Bridge. It should, of course, be remembered that since the oral agreement as alleged by the intervener only modified and did not destroy the original agreement found in Exhibit No. 12, the terms of the original agreement with the exception of the modification are still in effect and they contain no reference to a waiver of damages as consideration on the part of the property owners nor to an agreement to keep any streets open indefinitely.

The only written evidence bearing on such a point is contained in two county court orders, Exhibit 4 and Exhibit 5. Both of these county court orders would seem to contradict the terms and interpretation of the agreement as stated by the intervener. These orders are dated in 1940 and 1941, and, in essence, they state that the Fourche Dam Pike located south of the Airport limits will be closed down due to the needs of the national defense program. The orders then recite that it has been represented to the court that the City of Little Rock will widen and repair East Eleventh Street from the right-of-way of the Missouri Pacific Railroad Company, east to Harrington Street, thence north to Tenth Street and thence east to the city limits and that the City will also extend East Roosevelt Road east from Confederate Boulevard to the city limits. Pulaski County will then construct East Roosevelt Road from the then city limits to the bridge over Fourche Creek on the Fourche Dam Pike.

It will thus be seen that neither order mentions any modification of an agreement, and neither order mentions any length of time during which said streets must be kept open. The Court orders provide only that East Tenth Street and East Roosevelt Road must be extended to the city limits as they existed in 1940 and 1941. The City carried out the terms of the Pulaski County Court orders and extended East Tenth Street and East Roosevelt Road to the city limits existing in 1940 and 1941. East Tenth Street was paved and maintained to the present location of Cornish Street which was the city limits in 1940 and 1941 and which is some 3,800 feet west of the portion of East Tenth Street vacated by City Ordinance 9290. East Roosevelt Road was likewise extended to the city limits which were then located some distance west of the Missouri Pacific Railroad right-of-way, and consequently, some distance west of the portion of East Roosevelt Road vacated by City Ordinance 9290.

Therefore, even assuming that the agreement concluded in 1935 is valid and that an oral modification of this agreement was concluded in 1940, the City has abided by the terms of the agreement and the modification. Neither agreement contains any language which states that the property owners have agreed to waive their damages so long as the City continues to abide by the agreement. Neither agreement contains language which would obligate the City to keep any street or road open for an indefinite period of time. The City has complied with the terms of the 1940 modification and the streets which were to be extended under the county court orders have been extended and are still in operation at the present time. In fact, both East Tenth Street and East Roosevelt Road are still in operation throughout their entire length except that a certain portion of each has been vacated and, in each case, a by-pass route has been constructed to skirt the vacated portion and then rejoin the original street. The location of

both streets has merely been altered; neither street has been closed; and the parts of both streets which have been vacated are located at a considerable distance from the city boundaries as they existed in 1940 and 1941 and could thus have no bearing on whether or not the City has complied with county court orders issued in 1940 and 1941.

This alleged violation of the agreement between the City and the landowners should also be approached from another point of view. Assuming, for the purposes of argument only, that the City did attempt to enter into an agreement which would bind the City to keep East Tenth Street as presently located and East Roosevelt Road as presently located open indefinitely throughout their present length without alteration or change. According to virtually unchallenged principles of law, the City would have no power to enter into such an agreement or contract as contended for by the intervener. As is stated in 38 Am. Jur., Municipal Corporations, Sec. 498, p. 174:

> "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. Thus, a municipal corporation cannot obligate itself to keep a particular street open forever."

If the City attempted to enter into a contract which obligated it to keep a certain street open indefinitely in its present location, it would be a virtual surrender on the part of the City of the supervisory powers over streets which have been delegated to it by the Legislature and such an act of surrender would be outside the scope of corporate authority and thus *ultra vires* and void.

Since the City possesses no power to conclude the agreement in question, one of its agents (the Mayor) could certainly possess no more power than the City itself. In addition, it is not shown that the Mayor had any authority from the City Council to make the contract in question.

See *Halbut et al.* v. *Forrest City,* 34 Ark. 246; *Venable* v. *Town of Plummerville,* 130 Ark. 477. A further ground of invalidity is that the contract or agreement in question was entered into without observing the requisite statutory procedure required by Ark. Stats. (1947) 19-2403. *Gladson* v. *Wilson,* 196 Ark. 996.

Thus, in the opinion of this Court, no agreement was violated, and at any rate, such an agreement as here alleged could not have been entered into by any municipality because it is far beyond the scope of corporate authority and an attempt to so enter would have been *ultra vires* and void.

The fifth legal issue presented in the case was the question of estoppel and its effect on the defendants. The intervener alleges that since the defendants have extended the runway on the Airport, they have created the danger and hazard upon East Tenth Street and East Roosevelt Road and are therefore estopped from maintaining that the continued use of said streets is impracticable or dangerous. The extension of the runway was necessary to accommodate jet aircraft of the Arkansas National Guard and large commercial planes. The runway was extended in the interests of the public safety and necessity as well as the national defense effort. It was a valid exercise of the governmental functions of a municipality and express authority for such an action can be found in Amendment 13 to the Arkansas Constitution. See *Ragsdale* v. *Hargraves, Mayor,* 198 Ark. 614.

Only in exceptional cases is the doctrine of estoppel invoked for use against a municipal corporation and especially is this true when governmental functions are involved, for as is stated in 31 C.J.S., Estoppel, Sec. 141, p. 413:

> "In respect of its governmental functions a municipal or quasi-municipal corporation ordinarily may not be estopped."

In the present case, therefore, the extension of the runway was necessary for the defense effort and the public safety, it was a valid exercise of governmental power, and there are no circumstances involved which clearly demand that the doctrine of estoppel be applied to prevent manifest injustice. Defendants cannot, therefore, be estopped from alleging that the continued use of a certain portion of East Tenth Street and East Roosevelt Road is impracticable and dangerous.

Under the facts of this case, therefore, this Court is compelled to deny all relief sought by the plaintiff and the intervener, and accordingly to permit the defendants to begin the vacation and alteration of those portions of East Tenth Street and East Roosevelt Road described in Municipal Ordinance 9290. A decree in accordance with this opinion will be entered.

/s/ GUY E. WILLIAMS

Chancellor

Dec. 2, 1954.

AFFIRMANCE

CHANCERY DISTRICT

STATE OF ARKANSAS

IN THE SUPREME COURT

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 23rd day, being the fourth Monday of May, A. D. 1955, amongst others, were the following proceedings, to-wit: On the 4th day of July, A. D. 1955, a day of said term:

E. H. Risser, et al.....Appellants

v. No. 724

City of Little Rock, et al.....Appellees

Appeal from Pulaski Chancery Court, Second Division

This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, Second Division, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause.

It is therefore ordered and decreed by the Court that the decree of said Chancery Court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellants all their costs in this Court in this cause expended, and have execution thereof.

The Chief Justice and Justice Millwee not participating. Justice McFaddin dissents.

In testimony, That the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, C. R. Stevenson, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 21st day of October, A. D. 1955.

C. R. STEVENSON, Clerk

/s/ Philip N. Gowen, D. C.

SUPREME COURT OF ARKANSAS

No. 724

Opinion Delivered

E. H. RISSER, ET AL. ..... *Appellants*

v.

CITY OF LITTLE ROCK, ET AL. ..... *Appellees*

Appeal from the Pulaski County Chancery Court, Second Division.

Affirmed. The Chief Justice and Mr. Justice Millwee not participating. Mr. Justice McFaddin dissents.

SAM ROBINSON, Associate Justice

This is an effort by some of the residents of the Fourche Dam community, which is east of Little Rock in Pulaski County, to prevent the City of Little Rock from relocating a small portion of East 10th Street and East 26th Street in that city.

East 10th Street is on the north side of the Little Rock Municipal Airport and East 26th Street is on the south side. To facilitate the operation of modern aircraft, it is necessary for the city to install additional equipment at the ends of the northeast-southwest runway at the airport. In order to do this, the city seeks to abandon a small portion of East 10th Street and establish a new route one block north on 9th Street. This will require traffic to make two sharp turns in traveling from 10th to 9th Street. By actual timing, it takes 35 seconds longer to travel the new route than it does the old one. On the south side of the airport, the city has relocated East 26th Street for a distance of a little over half a mile. This was done by building a crescent shaped loop which makes the new route approximately 600

feet longer than the old route. The old route is in such a condition that it cannot be traveled, hence the comparative time it takes to travel the two routes is not shown, but it requires a total of one minute and 15 seconds to drive the entire new route at a usual rate of speed.

Appellants filed suit to enjoin the city from abandoning the old routes in favor of the new ones. The chancellor denied the injunction and the residents of the Fourche Dam community have appealed. Appellants contend that "the City did not comply with the statutory requirement of securing approval from the Pulaski County Planning Commission; the City had no control or jurisdiction to close the roads in question; the City has failed to provide comparable roads that are equally safe and convenient; the fact that the plaintiff's property does not abut on the portion of the road closed does not prevent the plaintiffs from suffering damages for which they are entitled to reimbursement; the court should have sustained the plaintiffs' plea of *res adjudicata*". Appellants also contend that the city is precluded from closing the roads by a contract made with the residents of the area. There are three points that merit discussion: first, is the city bound by a contract; second, is the cause *res judicata*; and third, have appellants suffered special and peculiar damages.

As to the question of whether the city is bound by an agreement heretofore made with the residents of the Fourche Dam area, appellants introduced evidence to the effect that, in 1934, the city undertook to close East 17th Street and the county road known as Fourche Dam Pike; that the residents of the Fourche Dam community objected, resulting in an agreement between the city officials, the county judge and the residents of that area, that the residents would not oppose the closing of East 17th Street, or seek damages for the closing of that street, if the city and county would construct a paved road on the north side of

the airport; and that, in 1940, the agreement was modified whereby the city was to improve East 10th Street, and improve and maintain East 26th Street with a right of way of 160 feet. Appellants contend that this was a valid and binding contract between the Fourche dam residents and the city, and that the city is not now at liberty to change the location of East 10th and East 26th Streets, which are the roads furnishing access to the Fourche Dam community.

Any attempt on the part of the city to enter into a contract relating to the permanent establishment or abandonment of its public streets would be *ultra vires*. In establishing, maintaining or abandoning its streets, the city acts in a governmental capacity and no city administration has the authority to bind a future administration in such matters. Cities have the authority to control, supervise and regulate all streets within their corporate limits. Ark. Stats., §§ 19-2313, 19-2304. "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. Thus, a municipal corporation cannot obligate itself to keep a particular street open forever." 38 Am. Jur. 174. It is also said in 25 Am. Jur. 553: "It is established that the governmental power to control and regulate the use of highways in the public interest cannot be surrendered, or impaired by contract. Particularly as to municipalities, control over streets is given to them for the benefit of the public. It is in the nature of a trust held by the corporation, from which arises a continuing duty on the part of such corporations to exercise legislative control over their streets at all times and places when demanded by the public good. They have no power, by contract, ordinance, or by law, to cede away, limit, or impair their legislative or governmental powers, or to disable themselves from performing their public duties in this regard, at least without the explicit consent of the legislature, or to delegate the exercise of such pow-

ers and the performance of such duties to others, so as to relieve themselves of responsibility in this respect." In 37 Am. Jur. 735, 736, it is said: "It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or the power of taxation." The law is clear that a city cannot contract away perpetually its rights, obligations and duties in connection with the public streets.

Next we reach the question of *res judicata*. Ordinance 9004 was adopted by the Little Rock City Council on September 22, 1952. Under the provisions of the ordinance, the portions of East 10th and East 26th Streets involved herein were abandoned. The ordinance set out that the city council had ascertained that portions of such streets "have not been actually used by the public generally for a period of at least five years subsequent to the filing of the plat". It is perfectly obvious that the ordinance was adopted on authority of Ark. Stats., § 19-3825, which provides: "In all cases where the owner of property within a city or town shall have dedicated, or may hereafter dedicate, a portion of such property to the public use as streets or alleys by platting such property and causing such plat to be filed for record, as provided by law, and any street or alley, or section thereof, shown on the plat so filed shall not have been actually used by the public as a street or alley for a period of five years, the City or Town Council

shall have power to vacate and abandon the street or alley, or any portion thereof, by proceeding in the manner hereinafter set forth." After the adoption of Ordinance 9004, appellants in the case at bar filed a suit to enjoin the city from enforcing the ordinance by closing a portion of East 10th and East 26th Streets. The complaint alleged, *inter alia*, that "The defendants are now attempting to close, block, obstruct and barricade a portion of said 10th Street and have already begun to tear up the roadway and to interfere with travel along said road." An intervention was filed alleging that "The defendants are purporting to act under the authority of Ordinance No. 9004 of the City. Said ordinance is void and a nullity. Said ordinance was not enacted in the manner required by law and contains a recitation and finding that the road or street in question has not been used for a period of at least five years subsequent to the filing of the plat. In truth and in fact, said road has been constantly and continuously used by the public, including the plaintiff and all others similarly situated, and said use has continued without abatement or interruption at the time it was opened until and through the present time. Because of the invalidity of the ordinance, the portion of East 10th Street that purports to be affected by the ordinance has not been vacated and the defendants have no right or authority to attempt to block, barricade, close and obstruct any portion of East 10th Street and the efforts of the defendants to close, barricade, block and obstruct East 10th Street are without authority of law and are of great damage to this plaintiff and to all others similarly situated." Both a demurrer and an answer filed by the city asserted the validity of Ordinance 9004 as a complete defense, and did not attempt to justify the closing of the streets on any other ground. In fact, there was no other ordinance authorizing the closing of the streets. On a final hearing, there was a decree enjoining the defendants from closing portions of the streets involved. (The pleadings

must have been considered amended to apply also to East 26th Street.)

If Ordinance 9004 was void because it was based on the false premise that the streets in question had not been used for five years, then the city was without authority to close the streets and the injunction was granted properly by the trial court. It appears conclusive that the streets had been regularly used within the five-year period, and therefore, that Ordinance 9004 was not passed in accordance with Ark. Stats. § 19-3825 authorizing the closing of streets where they have not been used for five years. There was no appeal from the Chancellor's decree enjoining the city from closing a portion of the streets. The date of the decree was June 26, 1953.

A short time later, on August 10, 1953, the City Council, acting on authority of Ark. Stats. § 19-2304 which gives the city the power to vacate portions of public streets, adopted Ordinance 9290. It provides for the closing of the same portions of East 10th and East 26th Streets as did the void Ordinance 9004. Seven days after the adoption of Ordinance 9290, the case at bar was filed attacking its validity. A copy of the ordinance is made a part of the complaint. (It will be recalled that this ordinance had not been passed by the City Council at the time of the trial involving the validity of Ordinance 9004.) The prayer of the complaint in the present case asks that Ordinance 9290 be declared null and void. An intervention filed by one of the appellants is to the same effect, and asks that the city be enjoined from closing the streets. There was no effort to enforce the order made in the first suit enjoining the city from closing the streets. The only issue in the first suit was the validity of Ordinance 9004. The city asserted no authority for closing the streets except the authority bestowed by that ordinance. True, the plaintiffs attacking the validity of the ordinance alleged damages, but such

allegations were necessary to give them a standing in court. Without an allegation of damages, the complaint and intervention would have been demurrable. If the cause is *res judicata*, as appellants claim, then the filing of the present suit was wholly unnecessary. The injunction in the first suit would have been sufficient to prevent the closing of the streets.

The principle of *res judicata* is so well known that it need not be restated here. One of the necessary elements of the doctrine is that the issues must be the same. In the first case, the only real issue was the validity of Ordinance 9004. The right of the city to close a portion of the streets, had this ordinance been found valid, was never considered. The city's right to close a portion of the streets under the authority of Ordinance 9290 was not involved. This ordinance was not in effect when the first case was tried. At the time of the first suit, the city could close portions of the streets only under the authority of Ordinance 9004, and the only issue raised in those pleadings was the validity of that ordinance. Hence, the issue in the first case is not the same as the issue in the case at bar, and the cause is therefore not *res judicata*.

Next we come to the question of whether the appellants suffered special and peculiar damages. None of the plaintiffs own property abutting the portions of the streets being closed, but even if it is conceded that appellants have been damaged by the relocation of the roads, they have suffered no peculiar or special damages which could give rise to a cause of action. Travelers on 10th Street, as relocated, must turn two corners and travel a little farther, which requires less than a minute in additional time. This slight inconvenience, however, is not peculiar to appellants alone. This street is an outlet from the city to one of the most thickly populated sections of the county. Every person

that travels the street suffers the same inconvenience as the appellants.

The principal contention of the appellants in regard to East 26th Street is that their property is especially suitable for industrial development and that the change in the street materially lessens the value of the property from that standpoint. They say that 26th Street, before being relocated, had a 160-foot right of way. (The paved section was formerly 18 feet wide, while the new pavement is 22 feet wide.) Appellants contend that the 160-foot right of way would be more attractive to industries than the new 40-foot right of way. The city owns all of the property on both sides of the old right of way as well as that on both sides of the new right of way. No doubt the city is anxious to assist in the industrial development of the county and it is not unreasonable to believe that the city would cooperate to the fullest extent in providing the necessary facilities for industries. But, be that as it may, the fact remains that appellants have access to the city and that they have suffered no peculiar and special damages. Appellants own a few hundred acres of land, but the streets in question lead to an area consisting of thousands of acres of level, alluvial soil that is the same as that owned by appellants.

On the question of damages, the case of *Little Rock and Hot Springs Western Railroad Company* v. *Newman*, 73 Ark. 1, 83 S. W. 653, is in point. There the Court said:

> "The rule of law governing cases of this kind is that no private action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff be greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage be small, or

though it be not confined to plaintiff, but be suffered by many others."

The Court further said:

"If a railroad is constructed across the highway leading from the home of one who lives in the country to the town or city to which his business requires that he must often go, it is very natural that he should feel that the danger of delay or accident to which he may thus be at times subjected renders his property less desirable as a home, while as a matter of fact its market value may be actually increased by the construction of the railroad. If he suffers an injury in such a case, it is general, and not special. If one owning a home in the country could recover damages in such a case, the man who owns a home in the city and has often to visit the country might on the same principle claim damages to his home in the city, and so there would be no end to such claims, for the injury is common to the whole public, whether in the town or county."

In *Wellbourn* v. *Davies*, 40 Ark. 83, the Court said:

"The inconvenience to the complainant in visiting his patients, however often he may be called to do so, is not different from that which every citizen suffers, whose business or pleasure may call him to travel the road. It is of the same character, only perhaps different in degree, from that which others suffer, who have other business, and live further away. This will not sustain his right of action. . . . The new roads were not as convenient to complainants as the old, and gradually the enclosures of his neighbors came to annoy and embarrassed him very seriously. Doubtless they did diminish the market value of his property. Nevertheless, these were the accidents to him, of a change in the population, business and necessities of the community at large. He made several applications to the County Court to reopen the old roads, and they were all refused. Evidently the public necessity did not require them."

In *Stoutemeyer* v. *Sharp*, 89 Ark. 175, 116 S. W. 189, the Court said:

> "In the present case the obstruction did not abut Sharp's premises. It was north of his place, and was between the tracts of land of Stoutemeyer and Parker. Sharp says the obstruction greatly inconvenienced him in taking his stock to Spring River for water and preventing egress and ingress to that part of the country. This was an injury differing only in degree, and not in kind, from that suffered by Parker, Hutchinson and the rest of the community. Assuming the road obstructed to be a public highway, we do not think that Sharp has brought himself within the rule above announced."

Also, in *Tuggle* v. *Tribble*, 117 Ark. 296, 6 S. W. 2d 312, the Court said:

> "In this connection it may be said that there can be no change of an existing highway that does not cause some private inconvenience, and, in that sense, injury to the abutting property owners, who have adapted themselves to the existing order of things and have purchased property on a highway which they believed would never be changed. There is no question presented in the record that appellants have been entirely cut off from any public highway by the proposed change in the public road in question."

In *Greer* v. *City of Texarkana*, 201 Ark. 1041, 147 S. W. 2d 1004, it is said:

> "Appellant insists that the effect of the changing of highway No. 71 is to destroy the value of his property, which constitutes the taking of his property without compensation. But the case of *Tuggle* v. *Tribble*, 177 Ark. 296, 6 S. W. 2d 312, defines the attitude of this Court on such questions. In that case the county court changed the location of a county road near the city of Hot Springs. Tuggle owned land on the old highway, and he appealed from the order of the county

court making the change, and he appealed to this court from the judgment of the circuit court affirming the judgment of the county court. It was held on the appeal that the county court had the right to change the road, although the change subjected Tuggle to some inconvenience, and depreciated the value of his property. . . . Appellant has not been deprived of his means of ingress and egress, as Dudley Avenue, on which his property is located, remains unaffected by the proposed change. Unaffected also is Jackson Street, running into Dudley Avenue at appellant's corner. Appellant's damage, as found by the court below, results from the diversion of the traffic; but this was not a recoverable element of damage."

Our conclusion is that the decree of the Chancellor is correct and is therefore affirmed.